In the United States Court of Federal Claims

No. 06-111C
(Filed November 20, 2006)
UNPUBLISHED

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JOHN DOE and JANE ROE, et al.,	*	Pleading and practice; motion
	*	to dismiss without prejudice
Plaintiffs,	*	pursuant to RCFC 41(a)(2);
	*	RCFC 56(f) motion for
v.	*	discovery.
	*	
THE UNITED STATES,	*	
	*	
Defendant.	*	
	*	
* *	*	

Ira M. Lechner, Escondido, CA, counsel for plaintiffs. Susan Tsui Grundsmann, National Federation of Federal Employees, Washington, DC; Jeffrey R. Krinsk and Mark A. Golovach, Finkelstein & Krinsk, San Diego, CA, of counsel.

Douglas K. Mickle, Washington, DC, with whom was Assistant Attorney General Peter D. Keisler, for defendant. Thomas M. Ray, U.S. Army Legal Services, Arlington, VA, of counsel.

MILLER, Judge.

ORDER ON MOTION FOR VOLUNTARY DISMISSAL

Plaintiffs on September 28, 2006, filed Plaintiffs' Motion for Voluntary Dismissal of Action Pursuant to Rule 41(a)(2). Defendant's response filed on October 3, 2006, cites cases and sets forth multiple reasons to support its contention that the dismissal be with prejudice, given that the rules do not entitle plaintiffs to a dismissal without prejudice as a matter of right. See RCFC 41(a)(1) (motion to dismiss not automatic after filing of motion for summary judgment). Defendant had moved for summary judgment on June 2, 2006. By order entered on October 4, 2006, the court ordered plaintiffs to file a reply by October 17, 2006, addressing the issues raised in defendant's response or face dismissal with prejudice

pursuant to RCFC 41(b). Plaintiffs filed their reply in the form of Plaintiffs' Motion for Leave To File out of Time Their Reply to Defendant's Response to Plaintiffs' Motion To Dismiss the Complaint Without Prejudice on October 26, 2006, to which defendant filed a response on November 13, 2006. */

The substance of plaintiffs' October 26, 2006 brief requires this court to comment on some of plaintiffs' improper characterizations of this case. First, plaintiffs' unwarranted misinterpretation of the court's denial of plaintiffs' earlier request for additional discovery made pursuant to RCFC 56(f), which is attached hereto as Appendix A, conflicts with the careful consideration of each of plaintiffs' requests therein. The order belies plaintiffs' contention that "[d]espite overwhelming precedent that Plaintiffs were entitled to some discovery at the very least, the Court ruled that no 'additional' discovery would be permitted even though it knew that Plaintiffs had no opportunity whatsoever to conduct any discovery at all." Pls.' Br. filed Oct. 26, 2006, at 3.

The Order on Rule 56(f) Motion entered on September 15, 2006, considers each of the seven discovery requests posited by plaintiffs and evaluates them in relation to established precedent. After discussion of each of plaintiffs' requests and plaintiffs' affidavit in support, the court determined that plaintiffs made an insufficient showing to meet the

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*/ Plaintiffs state in their brief filed on October 26, 2006, that "[p]laintiffs received no notice whatsoever of the electronic filing on October 3, 2006 of Defendant's Response to Plaintiff's Motion to Dismiss. Nor did Plaintiffs receive any notice of the Court's Order that was filed electronically on October 4, 2006 requiring Plaintiffs to respond by October 17, 2006." Pls.' Br. filed Oct. 26, 2006, at 1. Plaintiffs later state that

> Court personnel have concluded that Plaintiffs' counsel's email address had been deleted from the court's electronic system by unknown persons . . . . When counsel contacted this Court's clerk the very next day . . . , counsel was instructed that it was counsel's responsibility to maintain the proper functioning of the court's ability to notify counsel of Defendant's electronic filings.

Id. at 2. The court would not dismiss this case due to plaintiffs' failure to adhere to the requirements of the order entered on October 4, 2006, as plaintiffs have represented that a technical problem likely contributed to their failure to comply with the order. The court does note, however, that full access to the electronic case docket was available at all times to the plaintiffs, and that this docket lists all of the relevant filings, orders, and deadlines for submissions.

requirements of RCFC 56(f) and denied the motion accordingly. The court did not enter an order concluding that no additional discovery would be permitted; rather, the language of the order stated that plaintiffs had failed to meet their required burden of proof regarding the specific requests made.

Plaintiffs also misinterpret the court's October 4 order in their most recent brief, stating:

> On the very next day, before Plaintiffs would have an opportunity even to reply to Defendant's arguments, the Court summarily prejudged the issue at hand. The Court presented Plaintiffs with an ultimatum that "[i]f plaintiffs do not agree to a dismissal with prejudice, the case will proceed, and plaintiffs must file a responsive brief [to the motion for summary judgment] or risk dismissal with prejudice for failure to obey an order of the court/failure to prosecute pursuant to RCFC 41(b)."

Pls.' Br. filed Oct. 26, 2006, at 6. In contrast to this assertion by plaintiffs, the order entered on October 4, 2006, reads:

> Plaintiffs on September 28, 2006, filed Plaintiffs' Motion for Voluntary Dismissal of Action Pursuant to Rule 41(a)(2). Defendant's response filed on October 3, 2006, cites cases and sets forth multiple reasons to support its contention that the dismissal be with prejudice. Accordingly,
>
> **IT IS ORDERED**, as follows:
>
> Plaintiffs' reply to be filed by October 17, 2006, shall address them. If plaintiffs do not agree to a dismissal with prejudice, the case will proceed, and plaintiffs must file a responsive brief or risk dismissal with prejudice for failure to obey an order of the court/failure to prosecute pursuant to RCFC 41(b).

Id.

By inartfully substituting "[to the motion for summary judgment]" for the order calling for a reply regarding cases cited by defendant in its response filed on October 3, 2006, plaintiffs have misrepresented the instructions of this court. The language of the caption provided on the Case Management/Electronic Case Files ("CM/ECF") system to the order entered October 4, 2006, states, "Plaintiffs' reply to be filed by October 17, 2006, to defendant's response filed on October 3, 2006, shall address issues raised. Failure to accept

a dismissal with prejudice will result in case proceeding on defendant's dispositive motion or face dismissal under Rule 41(b)." Doe v. United States, No. 06-111 (Fed. Cl. Feb. 14, 2006), https://ecf.cofc.uscourts.gov/ (emphasis added). Again, the language of the court's order requests plaintiffs to respond to defendant's October 3, 2006, opposition to their motion for a dismissal without prejudice, not respond to defendant's summary judgment motion, which was filed on June 2, 2006.

Nevertheless, plaintiffs "agree to a dismissal of this case without prejudice" in their October 26, 2006, brief, Pls.' Br. filed Oct. 26, 2006, at 4, and defendant has stated that it "understands plaintiffs' [brief filed October 26, 2006] to be plaintiffs' final comment upon this matter . . . . Given this understanding, and plaintiffs' conclusion, concession, and agreement that the instant case should be dismissed with prejudice, defendant does not oppose plaintiffs' request." Def.'s Br. filed Nov. 13, 2006, at 1. Accordingly, based on the foregoing,

The Clerk of the Court shall dismiss the complaint with prejudice.

IT IS SO ORDERED.

No costs.

s/ Christine O. C. Miller

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Christine Odell Cook Miller
Judge

In the United States Court of Federal Claims

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JOHN DOE and JANE ROE, *et al.*,	*	**APPENDIX A**
Plaintiffs,	*	
v.	*	No. 06-111C
THE UNITED STATES,	*	(Filed Sept. 15, 2006)
Defendant.	*	

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ORDER ON RULE 56(f) MOTION

Plaintiffs filed their original complaint in the United States Court of Federal Claims on February 14, 2006. Defendant responded by filing a motion for summary judgment on June 2, 2006. Plaintiffs were granted an unopposed motion on July 5, 2006, extending the deadline for responding to the summary judgment motion until August 4, 2006. Plaintiffs then filed a motion for an extension of time to permit additional discovery pursuant to RCFC 56(f) on July 27, 2006.

FACTS

Defendant bases its motion for summary judgment upon documents (which are in the possession of both parties) that include: (1) United States Forces, Korea ("USFK") Fragmentary Orders, including #04-21, #04-23, and #05-01 (collectively, "Fragmentary Orders"), issued by Gen. (R) Leon J. LaPorte, which imposed a confinement of class members from September 24, 2004, through October 8, 2004, from the hours of 9 p.m. to 5 a.m. daily and from 12 a.m. through 5 a.m. beginning on October 8, 2004, and continuing through March 1, 2005; (2) a memorandum issued by the USFK on February 7, 2005, titled USFK Command Information - Talking Points for Selected Command Policies ("Talking Points"); and (3) the Declaration of Gen. (R) Leon J. LaPorte, executed on May 12, 2006.

In accordance with the requirements of RCFC 56(f), plaintiffs filed a supporting affidavit on July 27, 2006, stating the reasons for their inability to respond without additional discovery. Defendant countered in its August 4, 2006 opposition that additional discovery is unnecessary, contending that no genuine issue of material fact would be raised by the

requested discovery and that plaintiffs already possess all the documents and other evidence necessary to respond to the summary judgment motion.

DISCUSSION

Granting a motion for summary judgment "is inappropriate unless a tribunal permits the parties adequate time for discovery." Dunkin' Donuts of America, Inc. v. Metallurgical Exoproducts Corp., 840 F.2d 917, 919 (Fed. Cir.1988) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Subsequent to the filing of a motion for summary judgment, a non-moving party that has not been able to discover facts essential to oppose the motion may elect under RCFC 56(f) to file a motion for an extension of time in order to take discovery to aid in opposing the motion.

A party requesting discovery under RCFC 56(f) "must file a sworn affidavit with the court stating the reasons that the party cannot respond to the motion without discovery." Brubaker Amusement Co., Inc. v. U.S. 304 F.3d 1349, 1360-61 (Fed. Cir. 2002); see also Opryland USA, Inc. v. Great Am. Music Show, Inc., 970 F.2d 847, 852 (Fed. Cir. 1992) (discussing Fed. R. Civ. P. 56(f)). See generally C.W. Over & Sons, Inc. v. United States, 44 Fed. Cl. 18, 23 (1999). **/ Mere assertions or conclusory allegations are insufficient to permit a continuance to be ordered. See Young-Montenay, Inc. v. United States, 15 F.3d 1040, 1042-43 (Fed. Cir.1994) (conclusory and speculative affidavits do not raise issue of fact). The party seeking discovery cannot "simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts." Simmons Oil Corp. v. Tesoro Petroleum Corp., 86 F.3d 1138, 1144 (Fed. Cir. 1996); see also Brubaker, 304 F.3d at 1361 (stating that Court of Federal Claims properly noted that it is "'not required to permit discovery based merely on the hope on the part of a plaintiff that it might find evidence to support its complaint.'" (quoting B & G Enterprises, Ltd. v. United States, 48 Fed. Cl. 866 (2001)).

To succeed on a motion for additional discovery under RCFC 56(f), plaintiffs must file a sworn affidavit and state specific reasons that additional discovery is required to demonstrate specific factual issues that must be investigated in order to oppose the motion for summary judgment. ***/ Therefore, the court must examine the basis of plaintiffs'

**/ The Brubaker case refers to RCFC 56(g), which was amended in 2002 to RCFC 56(f). See 2002 Rules Committee Note, Rules of the United States Court of Federal Claims (as amended June 20, 2006).

***/ The language of Fed. R. Civ. P. 56(f) is identical to that of RCFC 56(f), which provides:

claims and the discovery requests in order to make a determination regarding the appropriateness of allowing discovery in aid of opposing the summary judgment motion. In this case plaintiffs allege that the effect of the curfew ordered by USFK amounted to compensable "standby duty" as defined by 5 C.F.R. § 550.112(k)(1) (2006):

> An employee is on duty, and time spent on standby duty is hours of work if, for work-related reasons, the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes. A finding that an employee's activities are substantially limited may not be based on the fact that an employee is subject to restrictions necessary to ensure that the employee will be able to perform his or her duties and responsibilities, such as restrictions on alcohol consumption or use of certain medications.

(Emphasis added.)

5 C.F.R. § 550.111 defines compensable work, as follows:

> [O]vertime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is– (1) Officially ordered or approved; and (2) Performed by an employee. . . . Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated. ****/

2/ (Cont'd from page 2.)

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

****/ Should the confinement orders amount to compensable "standby duty," plaintiffs then argue that the confinement hours are subject to overtime and night pay, pursuant to 5 U.S.C. § 5542 (2006), which provides, "[f]or full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek . . . , performed by an employee are overtime work and shall be paid for." (Emphasis added.)

The Federal Circuit has interpreted the "officially ordered or approved" language in 5 U.S.C. § 5542(a) as valid "on the ground that it imposes a procedural requirement that limits the right to overtime compensation under the statute or because it is inequitable." Doe v. United States, 372 F.3d 1347, 1357 (Fed. Cir. 2004).

Under the requirements of 5 C.F.R. §§ 550.111, 550.112(k)(1) and 5 U.S.C. § 5542(a), plaintiffs must allege (1) an official order or approval; (2) restriction by official order to a state of readiness at a designated post of duty; and (3) restrictions so substantial that the employee cannot use the time effectively for his or her own purposes, in order to qualify as "standby duty." Should the curfew period be classified as "standby duty," it is plaintiffs' burden to show that "overtime work" was incurred that required overtime compensation. See 5 C.F.R. §§ 550.111, 550.112(k)(1). In order to qualify for overtime compensation, the work must be (1) officially ordered or approved; (2) in excess of 40 hours in an administrative workweek; and (3) performed by an employee. See 5 U.S.C. § 5542.

Plaintiffs posit that they must investigate seven factual matters: (1) whether and when General LaPorte knew his authority to apply the curfew period arose from his role as employer and not military commander; (2) whether General LaPorte was truthful in his stated intent regarding civilian readiness, or whether this was pretext for avoiding overtime pay expenditures; (3) whether "specific documentary evidence" exists to support plaintiffs' averment on information and belief regarding restrictions of freedom of movement was published and/or broadcast by the USFK; (4) whether defendant has provided the full content of input from subordinate commanders, ROK authorities, and military and civilian personnel that impacts the curfew periods upon "off-installation" civilian employees; (5) whether the understanding of General LaPorte and his subordinates regarding substantial limitation of activities of DoD civilian employees is consistent with "standby duty;" (6) whether overall military readiness was supported by the curfew period; and (7) whether General LaPorte had a "duty obligation" that required confinement of DoD civilian employees during the time period of the curfew.

Plaintiffs insist that additional discovery relating to General LaPorte's knowledge regarding his authority as employer or military commander is required because "the Court's determination of whether the Confinement Orders required Plaintiffs to be on 'standby duty' requires detailed examination of the facts surrounding the confinement." Plfs' Br. filed Aug. 23, 2006, at 5. In addition, plaintiffs represent that the seven areas of discovery will lead to responses to the following questions:

> (1) Whether the civilian employees were confined by General LaPorte in his capacity as their employer rather than in his exercise of generalized military authority; (2) Whether the civilian employees were directed to remain in a

> "state of readiness"; (3) Whether the civilian employees were required to remain in a "standby" status; (4) Whether the purpose of the Confinement Orders was for the benefit of the employer; and (5) Whether the Confinement Orders substantially limited the activities of these civilian employees so that they could not utilize the time effectively for their own purposes.

Id. at 5-6.

Defendant argues, to the contrary, that additional discovery is not necessary based upon the language of 5 C.F.R. §§ 550.111, 550.112 and 5 U.S.C. § 5542(a). Defendant reads the "official order" requirement of 5 C.F.R. § 550.111 to limit plaintiffs to the official orders they cite (the Fragmentary Orders and Talking Points), so that no additional discovery is required to respond to the summary judgment motion.

The requirements of 5 C.F.R § 550.111 establish that the official Fragmentary Orders and associated Talking Points provide plaintiffs with the information needed to respond to the summary judgment motion. Plaintiffs' argument that being permitted to depose General LaPorte will help to gain an understanding of his role as employer or military commander, as defendant notes, is not germane to the determination of "standby duty" under 5 C.F.R. § 550.111. Nor can plaintiffs demonstrate that a material issue of fact could be raised by such an inquiry. Second, plaintiffs question the truthfulness of General LaPorte's various statements in the hope of discovering more information regarding the use of civilian readiness as a pretext for uncompensated work. While this argument bears on the intent of General LaPorte regarding the issuance of the curfew hours, it fails to demonstrate with specificity the relevance of his input to the requirements of 5 C.F.R. § 550.111 other than a vague assertion that it "will substantiate that Plaintiffs were required by their employer to be on 'standby duty' in a 'state of readiness.'" Plfs' Br. filed Aug, 23, 2006, at 6.

Plaintiffs' next three discovery requests relate to publications of the USFK, content of input from various USFK employees regarding the effect of the curfew upon civilian employees, and the understanding of General LaPorte's staff regarding restrictions on the movement of civilian employees during the curfew periods. Plaintiffs do not describe the documents that are requested with any specificity, nor do they demonstrate, with respect to any of their discovery requests, any question as to the validity of the language in the Fragmentary Orders and Talking Points, which document the restrictions on movement of civilian employees during the curfew periods. Plaintiffs' sixth and seventh discovery requests relate to the support of military readiness by the curfew orders and the "duty obligation" of General LaPorte. The relevance of the military readiness contribution on the curfew order has no bearing on the requirements of 5 C.F.R. § 550.111, and plaintiffs cannot

specify how delving further into the reasons justify imposing the restrictions and the nature of the restrictions can lead to raising an issue of material fact.

CONCLUSION

As plaintiffs fail to state with specificity what they expect to discover and demonstrably fail to prove an inability to respond to the legal arguments in defendant's summary judgment motion, all seven of plaintiffs' requests for additional discovery under RCFC 56(f) must be denied. *****/ Plaintiffs have failed to demonstrate how discovery will lead to information that will raise an issue of material fact. Accordingly,

IT IS ORDERED, as follows:

1. Plaintiffs' motion for discovery pursuant to RCFC 56(f) is denied.

2. By September 29, 2006, plaintiffs shall respond to defendant's motion for summary judgment.

s/ Christine O. C. Miller

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Christine Odell Cook Miller
Judge

*****/ Plaintiffs have also alleged that defendant has "opened the door" to discovery in two instances by: (1) claiming the affirmative defense of the Goldwater Nichols Act, 10 U.S.C. § 164 (2006); and (2) relying on the rebuttable declaration of General LaPorte for factual and opinion-based assertions. General LaPorte's declaration raised a potentially discoverable issue insofar as he states: "This curfew was not focused on *civilian* readiness but it did serve to enhance *military* readiness of our 37,000 military members." Decl. of General (R) Leon J. LaPorte, May 12, 2006, ¶13. Nevertheless, this statement does not suggest an assignment to "a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes," per the requirements of 5 C.F.R. § 550.111. Statements regarding enhancement of "readiness" by General LaPorte, while relevant to the general concept of "standby work," do not assist in determining whether the criteria set by regulation have been satisfied. Moreover, the court sees no reason why it would rely on General LaPorte's declaration in resolving the motion. Should further briefing reveal that it would play a role, the court will revisit this order.